No. 16,442

IN THE

United States Court of Appeals

For the Ninth Circuit

O. W. IRWIN, Trustee of the Estate of GENERAL EQUIPMENT CO., a copartnership composed of Wallace D. Loe and John O. Currence, Bankrupt,

Appellant,

vs.

B. H. TANNER,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

The Referee in Bankruptcy on November 3, 1958, made and entered his Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens (T. R. p. 6), which Order was made in proceedings pending in the United States District Court for the Northern District of California, entitled "In the Matter of General Equipment Co., a copartnership composed of Wallace D. Loe and John O. Currence, Bankrupt", and numbered 51656 in the records and files of said Court.

Appellant's petition to have the Order reviewed by the District Court was filed on November 7, 1958 (T. R. p. 9). The Petition was timely (11 U. S. C. A., 67c). The District Court had jurisdiction to review the Order (11 U. S. C. A., 67c). In an Order made and entered on March 10, 1959, the District Court affirmed the Order of the Referee (T. R. p. 18). Notice of appeal therefrom to this Court was filed March 31, 1959 (T. R. p. 18). The appeal was timely (11 U. S. C. A., 48). The jurisdiction of the Court to review the Order of the District Court is sustained by 11 U. S. C. A., 47.

STATEMENT OF QUESTIONS PRESENTED.

The questions before the Court are:

1. Was the chattel mortgage, which is the basis of Appellee's secured claim, properly acknowledged as required by the laws of the State of California?

2. Was the testimony of the notary public improperly admitted over Appellant's objection?

SPECIFICATIONS OF ERROR.

The Appellant's Concise Statement of Points Urged on Appeal filed herein (T. R. p. 51) gives in detail the points relied upon by Appellant. They are as follows:

1. That said Order was not supported by the evidence and is contrary to the law in that:

a. The finding of fact contained in the Referee's Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens dated November 3, 1958, and numbered 2 (and which was, by said Order of said District Judge, approved and confirmed), is contrary to the competent evidence adduced upon the trial of the issues joined between Appellant and Appellee by said Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens.

b. The aforesaid finding of fact is not supported by the competent evidence adduced upon the trial of the aforesaid issues more particularly referred to in said Referee's Order.

c. The conclusion of law made by said Referee in Bankruptcy and numbered 2 thereof is contrary to law in that it is not supported by competent evidence adduced upon the trial of said issues more particularly referred to in said Referee's Order.

d. That it affirmatively appears from all of the evidence adduced upon the trial of said issues that the chattel mortgage was not acknowledged according to law.

e. That it affirmatively appears from all of the evidence adduced upon the trial of said issues and from said Referee's Order, that said Referee in Bankruptcy based his Order solely upon the testimony of the Notary Public as to the acknowledgment of said chattel mortgage, and which testimony was admitted over the proper objection of Appellant.

STATEMENT OF FACTS.

On June 25, 1958, a voluntary petition in bankruptcy was filed by General Equipment Co., a copartnership composed of Wallace D. Loe and John O. Currence, and Wallace D. Loe and John O. Currence, individually, in the Southern Division of the United States District Court for the Northern District of California, and thereafter and on the same day it was duly adjudged a bankrupt by said Court. On August 1, 1958, O. W. Irwin, Appellant herein, the duly qualified and acting Receiver of the estate of said bankrupt, filed with the said District Court, his Petition for Leave to Sell Personal Property Free and Clear of Liens (T. R. pp. 3-4) and on the same date the Referee in Bankruptcy issued an Order to Show Cause thereon (T. R. pp. 4-5). Thereafter, after hearings held on said Petition and Order to Show Cause on August 15 and August 22, 1958, the Referee made and entered (on November 3, 1958) his Order Denying Receiver's Petition for Leave to Sell Personal Property Free and Clear of Liens (T. R. pp. 6-8) and thereafter Appellant timely filed with the Referee his Petition for Review of said Order (T. R. pp. 9-11), and thereafter a hearing was held on said Petition for Review before Honorable Lloyd H. Burke, Judge of said United States District Court, and thereafter and on March 10, 1959, Judge Burke made and entered his Order (T. R. pp. 18-19) here appealed from. Notice of Appeal was filed with said District Court on March 31, 1959 (T. R. pp. 19-20).

In August, 1957, Appellee, B. H. Tanner, entered into an agreement to sell the business known as General Equipment Co., to a partnership which was the predecessor of this bankrupt, and which Agreement was reduced to writing and is dated the 27th day of August, 1957. Thereafter said business was sold by Tanner to the bankrupt and a *chattel mortgage dated the 31st day of August, 1957,* was given by the bankrupt to Tanner covering the personal property which is the subject of this litigation, and which mortgage is Trustee's Exhibit No. 1 in evidence (T.R. pp. 42-48). The $5,000.00 payment called for in the chattel mortgage was delivered to Tanner by check on the 13th day of September, 1957, and said chattel mortgage was thereafter and on September 16, 1957, recorded by said Appellee. The witnesses for Appellee, Hutchison (T. R. pp. 27-28) and Montgomery (T. R. pp. 26-27) who were members of the partnership who bought the business and executed the chattel mortgage, testified that the mortgage was signed by all four partners at the bankrupt's place of business and Appellee Tanner, also so testified (T. R. p. 33); and said Appellee's witnesses further testified that Tanner then took the mortgage to the office of his attorneys, where Saul M. Weingarten then placed upon said mortgage his notarial acknowledgment and delivered to Tanner the $5,000.00 check.

The notary, Weingarten, testified that although the mortgage and the acknowledgment bear the date 31st day of August, 1957, he executed his notarial acknowledgment on September 13, 1957, when said mortgage

was brought to his office by Appellee, Tanner, and he further testified that the mortgagors acknowledged their signatures at that time (T. R. pp. 37-39).

The testimony of the Notary Public was admitted over the objection of Appellant Trustee (T. R. pp. 37-38) on the ground that the testimony of said witness would tend to impeach the other witnesses previously called by Appellee.

"(Testimony of Saul M. Weingarten.) . . .

. . . . .

A. It is. The document could not be completed on the 31st day of August; the reason it couldn't be completed is that the parties at that time agreed—

Mr. Aronson: I am going to object to any testimony that the [2] document could not be completed—any testimony that bears on that, your Honor. The document speaks for itself; it was made and executed on the 31st day of August, and *any testimony given by Mr. Weingarten would be by way of impeachment of any witnesses called.*

The Court: Well, Mr. Aronson, I would prefer that counsel for the respondent ask the question, and then if the question is objectionable you make the objection.

Q. (By Mr. Haas): The document was not signed on the date it bears?

A. No, it was not.

Q. Can you explain why?

Mr. Aronson: *I am going to object to this question and others along this line for the reason stated, and I ask that it be stricken.*

The Court: *Objection overruled.*" (Italics ours.)

ARGUMENT.

I. THE CHATTEL MORTGAGE IS VOID AS TO CREDITORS BY THE FAILURE TO PROPERLY ACKNOWLEDGE SAME.

It was the testimony of the witnesses for the Appellee Tanner, that the chattel mortgage here in question was signed by the four partners, Jack Montgomery, W. D. Hutchison, Wallace D. Loe and John O. Currence, at the bankrupt's place of business, and that it was thereafter taken by Appellee Tanner to the office of the notary where he (the notary) then affixed his seal. The pertinent testimony on direct examination of Jack Montgomery on this question is as follows:

> ". . . and the chattel mortgage was signed in the place of business . . .
>
> Q. How did the chattel mortgage get to the place of business; do you recall who brought it there?
>
> A. I believe Mr. Tanner brought it down at that time.
>
> Q. Who signed it there, do you recall?
>
> A. All four of us signed it there." T. R. p. 26.)

and then on cross-examination as follows:

> "Q. Was Mr. Weingarten at the place of business?
>
> A. Not to my knowledge." (T. R. p. 27.)

The witness Hutchison testified on direct examination that:

> "Q. This document that was brought down; where was it brought?
>
> A. To the office of General Equipment." (T. R. pp. 27-28.)

. . . . . .

"Q. What happened to the chattel mortgage then?

A. It was sent back to Weingarten's office, I believe.

Q. Do you know who took it to Weingarten's office?

A. I think possibly I did, or Mr. Tanner." T. R. p. 28.)

Appellee Tanner when called by his attorney to testify, was not asked on direct examination as to the place that the mortgage was signed or who was present at this time of signing, but on cross-examination Mr. Tanner testified as follows:

"Q. As I understand Mr. Tanner, when you took this mortgage in it had been signed by the four partners at their place of business?

A. Yes.

Q. Mr. Weingarten was not present when they signed it?

A. No." (T. R. p. 33.)

From the testimony above set forth, it is clear that the signatures of the mortgagors were placed on the document at the place of business, and that they did not appear before the notary public for the purpose of having their signatures acknowledged, and thus the acknowledgment is defective and not entitled to be recorded (Government Code Section 27287)[1] and

[1]Government Code Section 27287: Unless it belongs to the class provided for in either Sections 27282 to 27286, inclusive, or Sections 1202 or 1203, of the Civil Code, or is a fictitious mortgage or deed of trust as provided in Section 2952 of the Civil Code, *before an instrument can be recorded its execution shall be acknowledged by the person executing it,* or if executed by a corporation, by its

the Appellate Courts of the State of California have held that such a chattel mortgage is invalid as to creditors, *Rolando v. Everett,* 72 Cal. App. 2d 629, 165 Pac. 2d 33.

Section 1188 of the California Civil Code provides:

> "An officer taking the acknowledgment of an instrument must endorse thereon or attach thereto a certificate substantially in the forms hereinafter prescribed."

and Section 1189 sets forth, *inter alia,* the general form of acknowledgment as follows:

> "The certificate of acknowledgement, unless it is otherwise in this article provided, must be substantially in the following form:
>
> "State of .....,
County of ..... } ss.
>
> "On this ..... day of ..... in the year ..... before me (here insert name and quality of the officer), *personally appeared* ....., known to me (or proved to me on the oath of .....) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (or she or they) executed the same." (Italics ours.)

California Civil Code, Section 2957 provides, *inter alia:*

> "A mortgage of personal property or crops is void as against creditors of the mortgagor and

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president or secretary or other person executing it on behalf of the corporation, or proved by a subscribing witness or as provided in Sections 1198 and 1199 of the Civil Code, and the acknowledgment or proof certified as prescribed by law (italics ours).

> subsequent purchasers and encumbrances of the property in good faith and for value, unless: 1. it is acknowledged, or proved and certified in like manner as grants of real property."

The term "creditors of the mortgagor" as to whom a defectively acknowledged mortgage is void includes those existing prior to the execution of the mortgage as well as those whose claims are subsequent. *Noyes v. Bank of Italy,* 206 Cal. 266, 274 Pac. 68. *In Rolando v. Everett,* supra, the Court held that a chattel mortgage which was improperly acknowledged was invalid as to creditors, notwithstanding that the mortgage had been recorded, holding that it did not constitute notice to creditors. On this point see also 1 *Cal. Jur.* 2d, Acknowledgments, Section 5, Page 463, and the cases therein cited.

In *Hopper v. Keys,* 152 Cal. 493, 92 Pac. 1017, the Court held that since the authority for the creation of chattel mortgages derives its force from statutory provisions that the rights accruing under such mortgages can be protected and preserved only by fully meeting the requirements of the statute and strictly observing its provisions, which view was affirmed by *Kahriman v. Jones,* 203 Cal. 254, 263 Pac. 537. In *Burck v. Buchen,* 46 Cal. App. 2d 741, 116 Pac. 2d 958 at 961, the Court held that when taking an acknowledgment "the officer should require the acknowledging party to appear in person before him, as he is required to certify that such party 'personally appeared'. . . ." That an acknowledgment taken by an officer out of the presence of the grantors is irregu-

lar, see *Williston v. Yuba City,* 1 Cal. App. 2d 166, 36 Pac. 2d 445.

As a general rule, it is possible to show that portions of an acknowledgment are in error, the usual case being where one attempts to show that his purported signature is a forgery. Here the Court will note that the chattel mortgage, which is Trustee's Exhibit No. 1 (T.R. p. 42) was dated, and the acknowledgment also, bears the date of August 31, 1957, but that it was the testimony that it was not actually signed until September 13, 1957.

In *Bell v. Sage,* 60 Cal. App. 149, 212 Pac. 404 (1922), there were two chattel mortgagors, but only one of them acknowledged the execution. The mortgage was recorded, but the District Court of Appeal held the recordation to be of no effect because of only one acknowledgment

> "When the terms of the statute are complied with the record becomes conclusive notice, often contrary to the fact. When a mortgagee claims the benefit of such conclusive presumption which the law creates in his behalf, it is not unreasonable to hold him to a substantial compliance with the law which he invokes." 60 Cal. App. 149, 153.

Cited with approval in *Weatherbee v. Sinn,* 76 Cal. App. 98, 238 Pac. 134, 136.

From the foregoing testimony of Appellee and his own witnesses, it appears that the Referee was completely correct in finding in his Order (T. R. pp. 7-8) that without the testimony of the notary public the mortgage would be invalid as against the Trustee

by reason of the failure to have a proper and legal acknowledgment of the document.

II. THE TESTIMONY OF THE NOTARY PUBLIC WAS IMPROPERLY ADMITTED OVER APPELLANT'S OBJECTION.

The testimony of Appellee Tanner and his witnesses, Montgomery and Hutchison, supra, clearly shows that the chattel mortgage was signed at the place of business and was thereafter taken by Tanner to the office of the notary, and that the mortgagors were not present at the time that the notary signed the chattel mortgage and affixed his seal. At the subsequent hearing on August 22, 1958, when the notary public was called as a witness for Appellee, Appellant objected to the taking of certain testimony from the notary on the ground that it would serve only to impeach the witnesses previously called by Appellee (T. R. p. 37). This objection was overruled (T. R. p. 38).

The general rule as to the impeachment of a party's own witness is as stated in 3 *Jones on Evidence,* Civil Cases, 4th Ed., Sec. 853, page 1580, as follows:

> "According to the established rule of the common law, a party may not give general evidence that his own witness is unworthy of belief. This conclusion is based on the theory that a person who produces a witness vouches for him as being worthy of credit, and that a direct attack upon the veracity of the witness 'would enable the party to destroy the witness, if he spoke against him, and to make him a good witness, if he spoke

for him, with the means in his hands of destroying his credit, if he spoke against him'."

See 27 *Cal. Jur.* Witnesses, Sec. 148, page 174, and the cases therein cited, wherein it is stated:

"In addition to the requirement that a witness give material testimony, in order that a party producing a witness may impeach him by proof of inconsistent statements, *it must appear that such party has been misled and taken by surprise.* Furthermore, such surprise must be substantial, and founded upon an honest belief that the witness' testimony would be different from that given. Clearly, a party may not be said to be surprised by the testimony of a witness which accords with a deposition previously taken; a party may not impeach his witness by evidence of his declarations contrary to a stipulation as to the testimony of such witness; *nor is it permissible to call a witness solely for the purpose of impeaching him.*" (Italics ours.)

Here it is quite plain that counsel for the Appellee was neither misled nor taken by surprise so he could not qualify for the exception to the rule on impeaching one's own witness and the testimony of the Notary Public must obviously be only for the purpose of impeaching the prior witnesses.

We here call to the Court's attention the fact that the Referee based his decision solely upon the testimony of the Notary Public and that if Appellant's objection to the testimony of the Notary Public was properly made and should have been sustained that he would have found to the contrary, and we specifi-

cally refer the Court to Conclusion No. 2 of said Referee's Order, which states as follows:

> "Wherefrom the Court Concludes: . . .
>
> "2. That solely by reason of the testimony of Saul M. Weingarten, Notary Public, as to the acknowledgment of said chattel mortgage, said chattel mortgage was properly executed, acknowledged and recorded and is a valid and existing lien upon the personal property as against the estates of the above-named bankrupts (it is here noted that the testimony of said Notary Public on the subject of the alleged acknowledgment of said chattel mortgage was admitted by the Court over the objection thereto of counsel for said Receiver, which objection was made upon the grounds that said testimony would be incompetent, irrelevant and immaterial and that the questions which elicited such testimony from said Notary Public tended to impeach the testimony theretofore adduced by Respondent and accepted by the Court as to the lack of acknowledgment of said chattel mortgage by the mortgagors therein named), and good cause appearing therefor, . . ." (T. R. pp. 7-8).

CONCLUSION.

In view of the facts and law hereinabove set forth, it is Appellant's contention that the chattel mortgage here in question was not acknowledged as required by the laws of the State of California, and thus not entitled to recordation and thus void against Appellant herein. The testimony of the Notary Public upon which the Referee's Order was based was improperly

admitted over objection, and that the Order of the District Judge here complained of should be, by this Court reversed and remanded with instructions to the District Court to make and enter an Order in said bankruptcy proceedings that said mortgage was and is invalid as against Appellant, and that Appellant be authorized to sell the personal property covered by said chattel mortgage, free and clear of the lien thereof.

Dated, July 20, 1959.

Respectfully submitted,
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(Appendix A Follows.)

Appendix "A"

Appendix A

TABLE OF EXHIBITS
Rule 18 2(f)